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ABSTRACT

The momentum of the individual rights movement has placed such an emphasis on individual claims and needs that all the nation's institutions have become suspect. These include churches, the family, and schools--those structures that mediate between the individual and the impersonal megastructures of society. These institutions are part of the private sphere of an individual's life and are the places where "meaning, fulfillment, and personal identity are to be realized." The megastructures of society include the institutions of the economic marketplace as well as the institutions of government and are typically alienating. Recent court decisions have taken away many of the protections previously enjoyed by institutions such as church, schools, and family. As these institutions are under attack, there is a moral ambivalence in society caused by a loss of confidence in public and private institutions of all kinds. The nation's meaning-giving enterprise is threatened at a time when the nation needs a reaffirmation of the pursuit of personal values and purpose. (SM)

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THE DECLINING INFLUENCE OF MEDIATING STRUCTURES IN THE CONSTITUTIONAL FRAMEWORK

by

BRUCE C. HAFEN

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The Declining Influence of Mediating Structures in the Constitutional Framework

Conference on the Bicentennial of the U.S. Constitution
"The Constitution and the Regulation of Society"
Brigham Young University, January 16-17, 1985

Bruce C. Hafen

I have been thinking the last few years about a declining, if not vanishing, breed among American institutions: the private, church-related college. In addition to serving recently as the president of such a college, I have been interested in the implications for private higher education of legislation introduced in Congress in 1984 and 1985 in reaction to the Supreme Court's 1984 decision in the case of Grove City v. Bell.

The desire of a college such as Grove City to remain independent of governmental control can apparently be perceived to stem from a desire to avoid public disclosure of some inappropriate activity, such as discrimination. This puzzles me, since there was no finding of discrimination in the Grove City case, nor has there been new evidence of discrimination on other campuses in recent years.

Today I wish to step back from the particular issues raised by Grove City long enough to suggest a perspective at the level of constitutional theory and public policy analysis. These comments are in the nature of a preliminary hypothesis and are subject to considerable further research and refinement. In general, however, I hope to sketch some possible outlines of a pattern for understanding the purpose and constitutional place of certain unique private American institutions which help

individual people find and nurture personal meaning and value in their lives. Private colleges are merely an illustration of these institutions. I hope also to suggest why the viability of these institutions is undermined by certain current legal and policy trends. I will then attempt to put the current civil rights legislative proposals into that larger context.

Professor Owen Fiss has written recently about the need for what he calls "structural reform" in certain of our institutions, especially governmental bureaucracies. The kind of reform Professor Fiss has in mind is directed by judges, who have a special responsibility under our constitutional system for defining and giving voice to the values of the Constitution. An example of structural reform is school desegregation, in which the courts have "penetrated and restructured" our public school system. This bold innovation led to the creation of new ideas and procedures, both organizationally and legally, because the implementation of the judicial mandates often required lengthy and complex supervision. Desegregation became "a total transformational process in which the judge undertook the reconstruction of an ongoing social institution," rather than merely resolving a dispute between two individual litigants. This process was driven by "the overriding commitment to racial equality," a constitutional value of such importance that it necessitated profound changes. (Fiss, "Foreward: The Forms of Justice, The Supreme Court 1978 Term," 93 Harvard L. Rev. 1, 2-3 (1979).)

Similar structural reforms have been undertaken in recent years in such institutions as prisons and mental hospitals, where violations of personal constitutional rights have been found on such a large scale that only a reform of the organizational structure itself would remedy existing wrongs. Professor Fiss believes similar reforms may be needed in such bureaucratic organizations as public housing authorities, welfare departments, taxing authorities, police departments, and state owned industries. In effectuating reforms of this kind, judges "can articulate and elaborate the meaning of our constitutional values," (p. 57) according to Fiss, because the judiciary is in the best position "among all the agencies of government . . . to discover the true meaning of our constitutional values." (p. 59) For Fiss, this judicial responsibility is "the meaning-giving enterprise implicit in constitutionalism itself." (p. 57)

I am intrigued by the use of such terms and concepts as "structure" and "meaning-giving" in this analysis, because they serve as an important touchstone for the analysis of another kind of organization, for the most part outside the governmental sphere, which is involved in a significant though different part of the "meaning giving enterprise" within our democratic system. To introduce my description of these other organizations, I make two observations about the Fiss theory. First, in his discussion of structural reform, he carefully limits himself to agencies of government. There could obviously be similar reforms in non-governmental agencies, but when such reform is based upon constitutional values, it is likely to be limited by the state

action doctrine. The institutions that interest me today are not state agencies and for that reason are subject to different constitutional constraints from those that apply to the state. Second, the constitutional values which Professor Fiss identifies as important to structural reform are primarily process-oriented values designed to limit the power of the State in its interaction with individual citizens: "liberty, equality, due process, freedom of speech, no establishment of religion," etc. (p. 1)

These process-oriented values define the terms on which the State must deal with its citizens. They also seek to assure each individual citizen the governmental protection and the freedom necessary for his or her own pursuit of personal meaning and fulfillment in life. But, under our theory of constitutional democracy, the State is not the source of the substantive values that give meaning to individual lives. Indeed, the State is discouraged by such basic doctrines as the separation of Church and State from establishing official value positions. Thus the guarantees of the Bill of Rights provide procedures and protections which are but a means toward the end of personal self-determination. By contrast, a totalitarian state gladly and aggressively assumes the role of imposing on all its citizens "one comprehensive order of meaning." (P. Berger & R. Neuhaus, To Empower People: The Role of Mediating Structures in Public Policy 3 (1977).) Among the most reprehensible characteristics of a totalitarian society is that the State denies its citizens the opportunity of pursuing their own sense of personal meaning and destiny as they may define it.

Yet the influence of our democratic State is so pervasive today that the process-oriented constitutional values that "inform and limit" the "governmental structure" are thought to be the "values that determine the quality of our social existence." (Fiss, at 1.) As a result, we actually live in something of a value vacuum. The "megastructures" of our society--which can include corporate conglomerates, large larbor unions, and especially the governmental bureaucracies--have overpowering influence, and yet they do not typically seek to tell us what our lives really mean. In the case of governmental megastructures, our democratic theory discourages them from telling us. Moreover, corporate business enterprises are concerned primarily with economic activity. This activity obviously impacts its consumers and employees in non-economic ways, but the activity remains, in general, concerned more with means than with ends in the pursuit of personal meaning. Perhaps it is no wonder that modern society feels so much personal loneliness and alienation, as these vast, meaning-neutral agencies have grown to proportions of boundless influence at the very time when other large scale forces have introduced widespread feelings of uncertainty and fear about both the meaning and the long term security of our civilization.

Richard Neuhaus and Peter Berger have thoughtfully described the interactive relationship that exists between the public and private spheres. The personal, private sphere is where "meaning, fulfillment, and personal identity are to be realized" in one's life. The public sphere, which by their definition includes the

institutions of the economic marketplace as well as the institutions of government, is made up of megastructures which are "typically alienating . . . [and] not helpful in providing meaning and identity for individual existence." (B&N at 2.) Standing between the individual and the megastructures are such "mediating structures" as families, churches, neighborhoods, and voluntary associations. These mediating structures have been called "the value-generating and value-maintaining agencies in society." (B&N at 6.)

For example, the family is "the major institution within the private sphere, and thus for many people the most valuble thing in their lives. Here they make their moral commitments, invest their emotions, [and] plan for the future." (B&N 19) Thus, the family interposes a significant legal entity between the individual and the State, where it performs a mediating as well as a value-generating function. We fully expect parents to inculcate in their children what we would not tolerate from the State; namely, the explicit transmission of intensely personal convictions about life and its meaning.

As part of this value transmission role, parents have long enjoyed the constitutionally protected right to direct the upbringing of their children. Largely for this reason, the schools to which parents sent their children were traditionally regarded as "in loco parentis," meaning literally, in the place of the parents. In this sense, both private and public schools originally assumed a mediating structure role as extensions of the family.

In more recent years, the structural place of the public school system has become ambiguous. What is a public school today? Is it an extension of individual families and therefore part of the value-oriented private sphere? Or is it an extension of the state, which makes the public school part of the value-neutral megastructures? Clearly the public schools today are by law and in practice primarily extensions of the governmentally sponsored megastructure. However, many parents and others still assume the public schools should play a value transmission role more typical of a mediating structure. The reality is that public schools are now cast in both roles, with some segments of the public expecting them to be value neutral while other segments expect them to take strong value-oriented positions. Such structural ambiguity has become the source of tension and ambivalence in the minds of teachers and administrators as well as in the public's perception.

This recent movement by the public schools away from the role of mediating structure toward the role of megastructure is actually quite typical of the way public perceptions and legal attitudes toward other mediating institutions have been changing. The momentum of the individual rights movement has placed such an emphasis on individual claims and needs that <u>all</u> institutions have become suspect, whether or not they are part of the constitutionally limited megastructures.

Consider in particular the emerging pattern that is being applied to that special cluster of institutions protected by the principles of the First Amendment, such as newspapers,

universities, churches, and voluntary associations. These institutions suggest in contemporary terms what deToqueville once called "the intellectual and moral associations of America," which he distinguished from the "political and industrial associations." (Democracy in America, Book Two, p. 201 (1956, Heffner ed.) They give priority to such meaning-related values as free inquiry, public dialogue, artistic expression, intellectual discourse, personal religious discovery, and the building of associations that foster mediation between the individual and the all powerful megastructures. Because of these roles, First Amendment institutions have traditionally enjoyed unusually protected status. The institutional protections are eroding, however, not because of a reduced commitment to First Amendment principles, but because those principles are seen primarily in individual as distinguished from institutional terms.

For example, one of the earliest and most celebrated descriptions of the concept of academic freedom as a constitutional principle was Justice Frankfurter's statement in the 1957 case of Sweezy v. New Hampshire (354 U.S. 234, 263 (1957).), which described academic freedom in institutional terms as the four essential freedoms of a university: who may teach, what may be taught, how it shall be taught, and who may be admitted to study. The Supreme Court relied on this language in its more recent Bakke case, which upheld a limited right for a university to establish admissions preferences for disadvantaged students. (Regents of the University of California v. Bakke, 438 U.S. 265, 312 (1978).) In general, however, most academic

freedom claims in recent years have been made by individual teachers and students against educational institutions. This is a perfectly understandable development, since school administrators may obviously violate individual free speech rights. At the same time, the effect of this mounting series of cases is to cast in the role of the enemy the institutions whose very nature is bound up in the long term nurturing of intellectual freedom. This view identifies colleges and universities more with the megastructures than with the meaning-oriented enterprise of mediation between individuals and the governmental megastructures.

My evidence for a similar change in emphasis in freedom of the press is primarily anecdotal at this stage. I was recently talking with a friend who has long been the publisher of a moderate sized daily newspaper. He told me the newspaper business isn't what it used to be, primarily because of the constant difficulty he experiences with young journalists who are deeply committed to what he called "advocacy journalism." This attitude represents a commitment not only to investigative reporting, but to the idea that news reporting should promote causes the reporter believes in. My publisher friend said his cub reporters view the First Amendment as a personal protection, not only against governmental censorship, but against the contrary judgments of their publisher. This particular publisher considers their views wide of the mark, since he pays the bills and is held responsible for the content of the paper. Yet I think the reporters' attitudes more typically reflect contemporary assumptions.

I suspect the publishers of campus newspapers (which in most cases is the school administration) have had feelings similar to those of my publisher friend, as recent cases have established the First Amendment right of student writers and editors in public schools to print what they please, even if that means requiring the administration to fund a newspaper whose content it opposes. (E.g. Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974), aff'd 515 F.2d 504 (2nd Cir. 1975); Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973).)

A similar dichotomy between individual and institutional First Amendment interests may be discerned in Supreme Court interpretations of the religion clauses. Even a representative treatment of this category must wait for another day, but the point can be illustrated by reference to Professor Mark Tushnet's observation about the impact of the liberal tradition on our understanding of the religion clauses. Tushnet believes the dominant influence of Protestantism in American society has given our view of the religion clauses a distinctly individualistic flavor, since Protestant theology typically emphasizes a direct connection between the individual and God. In the Catholic and Jewish traditions, by contrast, a greater role is played by institutional or tradition-laden communal forces.

This anti-institutional tendency is reinforced, in Tushnet's view, by the assumption of the liberal tradition that the free market economy is most likely to flourish when personal economic decisions are made according to self-interest and without interference from such intermediate institutions as churches.

The republican tradition, on the other hand, would allow more shaping of individual lives by the larger order, which creates more understanding of institutional religion. The ascendancy of the liberal tradition over the republican tradition in our history has therefore led to confusion about the meaning of religion as a category of constitutional interpretation. (Mark V. Tushnet, unpublished paper delivered to the Section on Law and Religion, Association of American Law Schools Annual Meeting, New Orleans, Jan. 5, 1986.)

Another example of the shift away from protecting mediating institutions in favor of protecting individual claims may be found in changing attitudes toward the constitutional status of marriage and sexual privacy. Traditionally, the social and economic units created by formal marriage and kinship patterns were considered among the most fundamental structural building blocks of the society. As early as 1888, the Supreme Court described formal marriage as "the most important relation in life" and "the foundation of the family and of society, without which there would be neither civilization nor progress." (Maynard v. Hill, 125 U.S. 190, 205, 211.) A family unit was thus seen as an entity, a mediating institution having even a political significance.

As described by the English writer D.H. Lawrence, "[T]he marriage bond . . . is the fundamental connecting link in . . . society. Break it, and you will have to go back to the overwhelming dominance of the State . . . . [M]arriage has given man the best of his freedom, given him his little kingdom of his

own within the big kingdom of the State, given him his foothold of independence on which to stand and resist an unjust State. Man and wife, a king and queen with one or two subjects, and a few square yards of territory of their own: this, really, is marriage. It is a true freedom." (A Propos of Lady Chatterly's Lover 35-36 (1973).)

In recent years, however, the legal significance of formal marriage has diminished, as flexibility in creating and terminating intimate personal relationships has emerged as an important individual right. Not only has there been an increase in the number of cohabitating or other non-traditional relationships, but the very definition of the term "family" has become a subject of intense debate. In the 1980 White House Conference on the Family, for example, one delegate asked a regional session of the conference to define the family as "two or more persons who share resources, responsibility for decisions, values and goals, and have commitment to one another over time." This proposal lost by only two votes among 761 delegates. ("All in the Family," Time, June 16, 1980, at 31.)

Professor Laurence Tribe foresees a coming liberation by the State of "the child--and the adult--from the shackles of such intermediate groups as family." Tribe's commitment to individual autonomy as the supreme constitutional value moves him to advocate for each person a right of liberation "from domination by those closest to them" in the entity of the formal family, even though he also acknowledges in a vague and contradictory way the need for legal recognition of alternative relationships that

"meet the human need for closeness, trust, and love" in the midst of "cultural disintegration and social transformation." (L. Tribe, American Constitutional Law 974-80, 987-90 (1978).) Under this highly individualistic view, the formal family unit is suspect for all the same reasons that the governmentally sponsored megastructures are suspect. Thus, all institutions, public or private, whether megastructures or mediating structures, are seen as the common enemy of individual rights. (See generally, Hafen, "The Constitutional Status of Marriage, Kinship, and Sexual Privacy--Balancing the Individual and Social Interests," 81 Michigan Law Review 463 (1983).)

The tendency to lump all institutions together in this perjorative way not only obscures the general distinction between the public and private sector, it more specifically obscures the distinction between mediating structures (which should augment the development of self-identity and personal meaning) and megastructures (which should protect individual self-determination by maintaining a free environment). This obscurity has two adverse effects on the potentially positive--indeed the absolutely essential--influence of mediating structures. For one thing, it impairs the processes, relationships, and associations necessary to the long term development of personal value systems. It also impairs the democratic framework itself: "Without institutionally reliable processes of mediation, the political order becomes detached from the values and realities of individual life. Deprived of its moral foundation, the political order is "delegitimated." When that happens, the political order

must be secured by coercion rather than by consent. And when that happens, democracy disappears." (Berger & Neuhaus, at 3. See also 1976 BYU L. Rev. 605,656-58).

This conceptual framework is one general way to describe why an independent college or university (especially a church-related institution) must be protected against those massive forms of governmental intrusion that uncritically assume any institution is part of the megastructure. These colleges are not part of the state megastructure. They were created and are maintained on totally different assumptions from the assumptions on which state institutions rest, because they are extensions of the private sphere of personal identity and family life, not extensions of the public sphere of government.

Against this background, I wish to consider two aspects of the federal civil rights legislation which has been proposed in 1984 and 1985. I will focus primarily on Title IX, which prohibits sex discrimination in federally assisted educational programs. First comes a consideration of the jurisdictional theory on which the legislative proposals are based. That theory is the constitutional spending power. Simply stated, Congress may condition grants of governmental financial assistance on the willingness of a recipient to comply with certain federal requirements or policies. The underlying legal doctrine here is that Congress should not allow the expenditure of governmental funds in ways that run counter to legitimate governmental objectives. The Supreme Court has interpreted the spending power broadly, so long as the conditions accepted by recipients are

"reasonable and unambiguous" (Grove City College v. Bell, 104 S. Ct. 1211, 1223 (1984) and "narrowly tailored" to the achievement of the legislative goal (Fullilove v. Klutznick, 448 U.S. 448, 480 (1980).).

Much could be said about spending power issues in civil rights legislation, but for my immediate purpose, I call primary attention to the willingness--indeed, the determination--of some sponsors of the current legislative efforts to be unconcerned about reasonableness, ambiguity, or narrowly tailored standards in determining how far the spending power should carry federal jurisdiction. Some of the sponsors would clearly prefer to avoid a concern with constitutional limits altogether. They would apply Title IX as broadly as legal enforcement could, as a practical matter, be accomplished.

Specifically, both the 1984 and 1985 versions of the legislation seek broad new extensions of federal authority, based on the general idea of extending jurisdiction beyond institutions or activities that are directly benefitted by federal assistance to those that are indirectly benefitted. There are two particular manifestations of this notion in the legislation. One is the language of the 1985 bill, which would define the original Title IX term "program or activity" to mean "all of the operations" of an "entity" receiving federal assistance. The assumption behind this change in statutory language is that if one part of a large organization receives federal aid, the entire organization is indirectly benefitted, which is a sufficient basis for regulation. As suggested by one student of the

legislation, if the sewer department in the City of Los Angeles receives a federal grant, the police department in the City of San Francisco should become subject to federal regulation, since the two departments are part of a common "entity"--the State of California.

A broader shift from direct to indirect benefits as a jurisdictional test may also be seen in the legislation's approach to defining "recipients" of federal assistance. The 1984 proposal defined recipients to include virtually any entity having business dealings with an actual recipient. This proposal was merely expanding the student aid analogy, which had been held by the Supreme Court in the Grove City case to establish recipient status for a college enrolling students who were themselves recipients of student aid. The 1985 bill uses different language, but is motivated by the same expansive intent.

Suppose a student who receives a Pell Grant pays for education-related rent and automobile repairs with a portion of his grant funds. Does that make "recipients" of the landlord and the repair shop? If a hospital becomes a "recipient" of federal assistance by accepting fee payments from individual medicare patients, does that also create recipient status for an independent contractor who provides respiratory therapy services for the hospital? A federal appeals court recently concluded that the independent contractor in the hospital example is a recipient, relying heavily on the student aid analogy. (Frazier v. Trustees of Northwest Mississippi Regional Medical Center, ___ F.2d ___ (5th Cir. 1985).)

By comparison, the legislative history of Title VI of the Civil Rights Act of 1964, an important foundation for the interpretation of later civil rights statutes, shows that Congress at that time rejected the indirect benefit theory. As stated, for example, by Senator Humphrey, "It is irrelevant, to the purpose of these acts, what the recipient does with the money he receives. His employees, the customers of his business, or other persons with whom he deals, are in no sense participants in or beneficiaries of these Federal programs."

Our sense of the distinction between the public and private sectors will be difficult to maintain if the concept of "indirect benefit" becomes a standard basis for federal jurisdiction. All private sector entities are benefitted indirectly by federal tax exemptions and spending patterns. In an earlier era, legislative and judicial policymaking was sensitive to the need for maintaining some theory of limits on the reach of governmental power. But the contemporary individual rights movement now has such momentum that any theory of limited State power is unlikely to be taken very seriously, because such limitations appear as little more than roadblocks in the path toward achieving particular social goals. It is curious that an individual rights movement would favor unlimited governmental power, but that now seems to be the case.

For instance, some advocates today argue that the elimination of actual sex-discrimination is an insufficient goal of federal civil rights policy. Rather, they stress the need to eradicate what they call all "structural" or institutional characteristics

in society that have the effect of reinforcing gender-based distinctions of any kind. Only in this way, it is believed, will the ultimate sources of discriminatory attitudes be reached and controlled. Surely our national policy must provide remedies against actual discrimination in employment, education, or in other environments; but larger questions are raised by the challenge to eliminate all private cultural sources of distinctions based on gender.

Political theorist Robert Nisbet has written that, "Earlier women's rights movements were . . . efforts to achieve for women a larger share of economic, educational, and cultural benefits--but within the family structure; or at least without seeking to alter that structure seriously. What gives present manifestoes, political actions, and movements toward legal reform their revolutionary character is the degree to which the substance of the family is change. For with sure revolutionary instinct, the women's liberation movement--at least in its radical expressions--goes right to the heart of the matter, which is the historical nature of the role of each of the sexes." (Twilight of Authority, 82-83)

The commitment to eliminating attitudes about sex-based roles is illustrated in a recent report on the status of women in higher education, which discusses the "crucial role" of campus "atmosphere, environment, or climate," along with "familial and social expectations" in retarding the personal and professional development of women students. The influence of religion has also long been regarded as a major "structural" factor in

perpetuating cultural assumpmtions that reinforce male-female distinctions. Said 19th century feminist leader Elizabeth Stanton, "The religious superstitions of women perpetuate their bondage more than all other adverse influences."

It is therefore natural for aggressive advocates to look to tax policies, civil rights laws, the spending power, or any other federal source to penetrate as far as possible into religion, family life, education, or other elements of the private sphere in order to influence the sources of individual value orientation. Indeed, the pervasiveness of federal spending makes the spending power an attractive vehicle to extend the regulatory authority of the state into any realm where the privately-held beliefs that encourage gender-based distinctions can be reached at their roots.

I note, parenthetically, that the Equal Rights Amendment would not reach as far as the proposed civil rights legislation in establishing gender-neutral values, since the ERA would apply only to state--not private--action.

Returning now to my earlier theme, the inclusion of indirect benefits within the spending power gives the appearance of strong linkage between the governmental megastructure and mediating structures. By this means, these mediating instutions can be subjected to meaning-neutralizing and value-neutralizing control as if they were in fact part of the governmental megastructure. The idea of transforming a private, church-related institution into a public institution in this way carries with it a special irony, because it tends to impose all of the tangled contemporary

assumptions about separating church and state upon--of all places--the campuses of church-related colleges. One result of this change is that the mediating role of such institutions is undermined, thus contributing to the general decline of meaning-generating and value-maintaining processes in society and the decline of pluralistic values.

There is a sense, of course, in which such attempts by gender neutrality advocates seek the opposite structural effect of converting the state-controlled and value-neutral megastructure into a value-oriented mediating structure. Attitudes about gender neutrality are at least arguably more a matter of personal values than they are a matter of constitutionally mandated equality, particularly because they direct their attack at the private root sources where beliefs and attitudes are generated, not merely at the more public place where actual discrimination exists.

It may therefore be appropriate to inquire whether the gender-neutral view of society is more entitled to a constitutional preference than competing views. For example, as mentioned earlier, American society has experienced in recent years a steady erosion of social and legal support for the concept of formal marriage, which has contributed directly and indirectly toward increasingly unstable family structures. The most serious harm caused by this instability is inflicted on children, whose developmental needs for continuity and stability are well documented. A plausible case can be made that a serious public policy reorientation is needed to restore support for

stable marriage and kinship patterns in the legal, economic, and social environment. This case could identify instances in which cultural attitudes are subtly changing in both institutional and social contexts, with the effect of undermining the attitudes and patterns essential to stable social structures. Such developments could be shown to have a long-range impact on democratic institutions as well as social stability.

Were such a reorientation to be undertaken, its goals and interests would probably conflict with those of the current campaign for gender neutrality. In cases of conflict, which view should be entitled to governmental sponsorship? Society's interest in upholding stable family patterns is not a trivial concern. Nor can that concern be easily dismissed as a camouflage for prejudicial attitudes. Of course serious differences in perception exist regarding the actual relationship between family stability and sex role differentiation. But the very existence of strong, unresolved differences on matters of such profound social consequence is enough to warrant a cautious approach in allowing the State to prefer one view over the other as a matter of dominant public policy.

The second issue I wish to address in the 1984 and 1985 civil rights legislation is that of religion. Religious organizations, whether churches, church-related colleges, or otherwise, deserve particular attention in this general discussion, because their role as mediating structures is protected by the free exercise clause of the First Amendment. The original language of Title IX recognized the importance of explicit protection for church-

related education by including a modest statutory exemption for cases where application of the law "would not be consistent with the religious tenets" of "a religious organization" which "controls" a school. However, the 1985 Civil Rights Restoration Act has been bogged down for the past several months in the House of Representatives, because the Bill's sponsors have been unwilling to add language designed to make the law abortion-neutral and to make the religious exemption available to religious institutions not "controlled" by churches.

This skittishness about protecting the civil right of religious liberty in a civil rights bill has puzzled some strong supporters of the general thrust of the proposed new law, such as the U.S. Catholic Conference. In fact, it was the insistence of the Catholic Conference on an abortion-neutral amendment that finally caused enough controversy to move the 1985 version of the legislation off its fast track before committee action had been taken in the House. It is curious to me that only an issue as emotional as abortion could attract enough attention to compete with an issue as emotional as civil rights. This phenomenon suggests that we are not likely to see a very rational approach to the balancing of important competing interests in future regulatory efforts of this kind. Many significant religious interests, of which abortion is only the most visible example, are affected by governmental intrusion in civil rights enforcement.

A number of recent cases have pitted religious interests against other civil rights claims. For instance, in the 1983

case of Bob Jones University v. United States, (103 S. Ct. 2017 (1983).) the Supreme Court upheld the denial of federal tax exemptions to church-related schools which maintained racially discriminatory school policies. The fundamental public policy interest in eradicating racial discrimination in education was held to outweigh whatever burden the denial of tax exempt status would impose on religious liberty interests.

The denial of a tax exemption in this case was an extraordinary step. But race has been a most unusual category in constitutional adjudication. Rules established in the racial context have often broken with long standing traditions and legal standards simply because the national interest in eliminating racial discrimination has been so deeply felt and so widely shared. However, it has become a common pattern for the advocates of non-racial causes to lay claim to those extraordinary rules, even when their claims most probably would not have been taken very seriously if heard by a court prior to seeing the trail blazed in the racial context.

For example, a local court in the District of Columbia earlier this year applied the Bob Jones test to require Georgetown University to grant official recognition to a student gay rights organization. The university argued this result would violate its religious liberty interests in view of the clear Catholic teachings against homosexuality. But the court found a "compelling governmental interest" in the elimination of discrimination on the basis of sexual orientation that "substantially outweighs the burden placed on the exercise of

religious beliefs." (Gay Rights Coalition v. Georgetown University, D.C. Ct of Appeals, July, 1985) The court did not address whether the public policy interest in eliminating this form of discrimination stood on any foundation different from the interest in eliminating racial discrimination.

The Supreme Court has recently agreed to hear another case which pits the national interest in eradicating sex discrimination against the national interest in preserving religious liberty related to attitudes about childrearing. In Dayton Christian Schools v. Ohio Civil Rights Commission, the 6th Circuit Court of Appeals overturned a lower court ruling by upholding the right of a church-related school to refuse to renew the contract of a teacher who wished to continue teaching after having a child. The school's policy was based on religious teachings which counseled mothers of young children against employment outside the home. (766 F.2d 932 (1985).) The Dayton case represents a clear conflict between the two competing policies mentioned earlier: the arguable need to eliminate all public and private sources of distinctions based on gender versus the arguable need to reinforce the interest of society and children in child-oriented family structures. This is an important problem because both interests are important.

In dealing with this policy conflict, it is worth remembering that, as important as is the need to eliminate actual sex discrimination, ideas about sex roles and family life are central to the religious beliefs of many people and many private institutions. Even apart from those religious beliefs, society's

interest in our cultural patterns of marriage and childrearing is also a matter of legitimate public policy concern. It is not possible to enact everything on the agenda of gender neutrality without undercutting not only certain religious beliefs, but also the mediating role of both families and churches.

There are also important differences between sex and race as legal classifications. It is therefore risky uncritically to transfer legal doctrines developed in the racial context to problems existing in the gender context. This is particularly the case when religious values are involved, because of the potential impact on matters of personal morality.

For example, the Fair Housing Act, one of the original race discrimination laws, was amended a few years ago by simply adding "or sex" to the statute. Shortly afterward, a single female was refused rental accommodations in a student apartment building because of a requirement by a church-related university that single students living off campus reside in sex-segregated buildings. After reviewing the woman's complaint, the Justice Department announced its intention to bring suit. However, when the public media realized that such enforcement of federal sex discrimination laws appeared to require single men and women to share apartments and bedrooms, the roof of public outcry fell in on the Justice Department. An agreement was finally reached which allowed sex-segregated housing at educational institutions, if established "on the basis of religious or moral principle." It is clear that widely supported religious and moral values can be undermined by the indiscriminate mixing of race and sex as legal categories.

One senses in today's society a general and growing uncertainty about the very issues of value and meaning with which mediating institutions have historically been concerned. Historian Barbara Tuchman has observed, for instance, an extensive loss of confidence in human judgment in Western society through the wrenching experiences of this century, one result of which is "a widespread and eroding reluctance to take any stand on any values, moral, behavioral, or aesthetic." (Tuchman, "The Missing Element: Moral Courage," in In Search of Leaders 3 (1967).) In the context of education, Gerald Grant concluded from his field research among private and public schools that, "[I]n many places we no longer have any agreement on what . . . provisional morality ought to be, or we feel that any attempt to provide it is a form of indoctrination. Hence, we [are] . . . prematurely declaring--even insisting--that children are adults capable of choosing their own morality as long they do not commit crimes. . . . Where [the informal trust created by shared agreement about provisional morality] does not exist, I think we are headed for ever greater stress, instability, and perhaps the eventual abandonment of the public schools." (Gerald Grant, "The Character of Education and the Education of Character," 18 American Education 135, 146 (1982).)

This kind of moral ambivalence is caused by many large scale cultural influences. But pervading all of these cross-currents is a loss of confidence in public and private institutions of all kinds. Mediating structures have traditionally stood betwen individuals and the governmental megastructures. Now they are

under assault from the individual side because of their institutional character at a time when all institutions are suspect. They are also under assault from the megastructure side, partly because of constitutional doctrines that favor individual over institutional values, and partly because financial pressures are forcing their absorption by the governmental megastructure. In addition, the megastructure is responding to continuing pressure from the advocates of egalitarian value positions who want the megastructure to absorb mediating institutions in order to control them.

The Grove City College case offers an interesting study of these problems. I mentioned earlier that public education is in an ambigious place along the spectrum between mediating structures and megastructures. The Grove City situation introduces the additional factors of private education and a background concern with religious values. It also asks for consideration of the limits to which we should stretch our concept of federal assistance, because only student aid was involved in the case. In addition, as a religious institution that is not controlled by a church, Grove City college is not protected by the present Title IX religious exemption.

In the midst of this complex environment, the nature and mission of the college remains squarely within a mediating role sustained by the values of the First Amendment. For its students and their families, as well as for its financial supporters and other constituents, the college is a classic illustration of a value-generating and value-maintaining agency devoted to

augmenting the individual quest for personal meaning and purpose in life. It is thus an extension of the private sphere of individual and family life, even though its role as an institution of higher education also allows it to share its perception of issues of meaning and value in the public marketplace of ideas. In this way the mediating role extends in both public and private directions.

In general, Title IX, as broadened to apply campus wide by the currently proposed legislation, seeks to establish an official orthodoxy about value questions relating to the roles of the sexes in society, matters of sexual morality, and attitudes about marriage and family life. The imposition of these views on the campus of Grove City College is unsettling, not only because of the chilling effect thereby imposed on the college as a mediating institution, but also because the value-neutral megastructure of government is being cast in a value orientation of its own, having been captured by a particular viewpoint in the name of value-free egalitarianism.

Consider the historical diversity which has characterized American higher education. We have had single-sex colleges, religious colleges, secular colleges, vocational institutes, and pure liberal arts institutions. This diversity manifested a deeply-held idea that individuals and institutions should be permitted to pursue the goals of education in their own way, thereby giving meaning to the the belief that each man or woman should be free to define the purpose of his or her own life, in association with the distinctive family, religious, or

educational ties he or she might seek in the process of working out that purpose. The government of the United States does not know which of these educational approaches is most correct, nor should it try to decide.

When the State asserts a value-laden orthodoxy in so threatening a way that any contrary view is marked as illegitimate, the core sense of being in an institution such as Grove City College is threatened. In a broader sense, the nation's meaning-giving enterprise is threatened, at a time when we may need a reaffirmation of the pursuit of personal purpose and values as never before.